UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GeBBS HEALTHCARE SOLUTIONS, INC.
Plaintiff,

Hon. Gregory H. Woods

CIVIL No: 16-cv-02206-GHW

v.

ORION HEALTHCORP, INC.,
Defendant.

MEMORANDUM OF LAW

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS FOR FAILURE TO STATE CAUSE OF ACTION

The Plaintiff requests the Court to dismiss the Defendant's first amended counterclaims for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In the interest of brevity, the Plaintiff respectfully refers the Court to the accompanying Certification of Counsel, dated November 21, 2016, for a complete recitation of the relevant procedural history of this case.

PRELIMINARY STATEMENT

The Defendant, in its amended counterclaims dated October 11, 2016, alleges the following three counts of counterclaims: (1) breach of contact regarding nonperformance, (2) breach of contract regarding improper termination and (3) fraud, against the Plaintiff. The Plaintiff submits that each of these counts are lacking in factual support and inadequate to support the claims and that the Defendant's counterclaims be dismissed for failing to state a claim upon which relief may be granted, in accordance with the arguments as enumerated hereunder.

ARGUMENT

A motion to dismiss a counterclaim is evaluated under the same standard as a motion to dismiss a complaint." Revonate Mfg., LLC v. Acer Am. Corp., No. 12 Civ. 6017, 2013 WL 342922, at *2 (S.D.N.Y.Jan.18, 2013) (quoting Netrix Leasing, LLC v. K.S. Telecom, Inc., No. 00 Civ. 3375(KMW), 2001 WL 228362, at *8 (S.D.N.Y. Mar. 7, 2011)).

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. Walker v. Schult, 717 F.3d 119, 124 (2d Cir.2013). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546. The Court, therefore, does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Id. at 570. The Plaintiff has provided adequate facts in its Complaint which are more than sufficient to meet the legal threshold mentioned herein and thereby warrant inferences in favor of the Plaintiff herein.

The Supreme Court clarified the appropriate pleading standard in Ashcroft v. Iqbal, 556 U.S. 662, in which the court set forth a two-pronged approach to be utilized in analyzing a motion to dismiss. District courts are to first "identify pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 556 U.S. at 679. Given the legal standard in a motion to dismiss, the Defendant's counterclaims lack the vires to withstand the thresholds acceptable to this court.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a [d]efendant has acted unlawfully." Id. at 678 (citing Twombly, 550 U.S. at 556–57). Ferring B.V. v. Fera Pharm., LLC, No. CV 13-4640 SJF AKT, 2014 WL 4829053, at *7 (E.D.N.Y. Aug. 13, 2014). As evidenced by the allegations in the Complaint, the Plaintiff has made all necessary and reasonable efforts towards recovering the monies to which it was entitled. The Notice of Default (**Exhibit C**) and Notice of Termination (**Exhibit D**), are evidence of such fact.

At every turn, the Plaintiff ensured that it abided by the terms of the Addendum between the parties. For example, as of December 9, 2015, around sixty-four (64) invoices were either underpaid or entirely unpaid and delinquent. As of that date, the sum of the amounts due and owing to the Plaintiff was $777,022.05, with additional amounts not-yet-invoiced for November and December of 2015. Accordingly, on Wednesday, December 9, 2015, Plaintiff provided written Notice of Default to Defendant via facsimile and certified mail (the "Notice of Default"- **Exhibit C**). The Notice of Default set forth the amount owing, requested immediate payment of the amount owing, and indicated that "[f]ailure to make the payments on time and in full by 5:00 PM EST December 21st 2015 or to arrange for payment in a manner satisfactory to GeBBS likely will force GeBBS to terminate the Agreement and to cease all services as of December, 22nd 2015 in accordance of [sic] with section 5(c) of Addendum 3." Pursuant to Section 9(i) of Addendum 3, such notice was effective no later than Thursday, December 10, 2015 (**Exhibit B**).

Defendant provided no written response to the Notice of Default nor did it dispute the content of the Notice. Instead, Defendant made only a partial payment in the amount of $166,266.85, still leaving dozens of invoices unpaid and outstanding, and leaving a shortfall of $610,755.20. On December 21, 2015, pursuant to Section 5(c) of Addendum, Plaintiff provided written notice that it would terminate the Services (the "Notice of Termination") effective at the close of business on Monday, December 21, 2015 (**Exhibit D**). Not having received any response from the Defendant, Plaintiff did terminate all Services, in compliance with the notice required by, and pursuant to, Section 5(c) of Addendum 3, as of Tuesday, December 22, 2015. Thus, Plaintiff fulfilled its obligation to provide at least ten (10) days written Notice of the Termination of Services.

To date, the amounts invoiced and due and payable to the Plaintiff are the sum of $1,064,000, including those amounts due and owing for the Services performed in November and December of 2015. However, the Defendant ignored the notices and now state frivolous counterclaims without providing the court any basis of the computation of damages they seek.

ALLEGED BREACH OF CONTRACT – NON PERFORMANCE
(Count I of the Defendant's Amended Counterclaims)

To withstand dismissal, "a [counterclaim] must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' Iqbal, 129 S.Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Defendant's first counterclaim in alleged Breach of Contract by the Plaintiff as regards Nonperformance, alleges failure of the Plaintiff to- (a) devote sufficient personnel and resources to its performance of the Services; (b) process new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records. This counterclaim of the Defendant is a mere duplication of certain phrases that appear in Paragraphs 2 and 3 of the Addendum (**Exhibit B**) but do not provide specifics of the alleged non-performance.

As to the allegations made by the Defendant above, Plaintiff reiterates that it devoted the best of its personnel and resources toward the fulfillment of services of their obligations under the Addendum (**Exhibit B**) to the Defendant. This is evidenced by the fact that the Defendant never provided the Plaintiff any written notice of dispute related to the Plaintiff's services prior to the Complaint being filed. Furthermore, the Plaintiff continued to provide services to the Defendant until December 21, 2015, even after providing the written Notice of Default dated December 9, 2015 (**Exhibit C**). The Plaintiff in the Notice of Default (**Exhibit C**) clearly mentions the dates, invoice numbers, open balances and amounts, along with reflecting the outstanding balance owed by the Defendant to the Plaintiff as of December 9, 2015. The details entailed in the Notice of Default (**Exhibit C**) would not be available if not for the timely processing of charges by the Plaintiff coupled with the maintenance of accurate records for the same. The very fact that the Plaintiff sent over the Notice of Default (**Exhibit C**) to put the Defendant on notice of their nonpayment indicates the Plaintiff's prompt pursuance of unpaid balances. Therefore, it is the Plaintiff's assertion that the services provided were in accordance with the intention of the parties and unwavering from the terms as dictated by Addendum 3 (**Exhibit B**). It is the Plaintiff that has been unjustly denied the rightful monies owed to it despite adhering to the agreement governing the parties herein.

For the reasons mentioned above, the Plaintiff requests that this counterclaim be dismissed.

ALLEGED BRACH OF CONTRACT – IMPROPER TERMINATION
(Count II of the Defendant's Amended Counterclaims)

Though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp., No. 09–CV–8285, 2010 WL 3910590, at *4 (S.D.N.Y. Sept. 29, 2010) ("A complaint is inadequately pled 'if it tenders naked assertions' devoid of 'further factual enhancement.'), (quoting Iqbal, 129 S.Ct. at 1949). Further, if a complaint contains "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679. The Plaintiff submits that the allegations contained in the complaint are justified by the documents submitted as exhibits herein.

Defendant's second counterclaim relating to Breach of Contract cites Improper Termination by the Plaintiff. The Plaintiff reiterates that termination undertaken was in line with the procedure set forth for termination to be followed, as dictated by Addendum 3 (**Exhibit B**). The Defendant's answers purport to place blame on the Plaintiff for improper termination by specifically citing Clause 5(c) of the Addendum as regard "Termination for Nonpayment". Clause 5(c) of the Addendum (**Exhibit B**) reads –

> "Termination for Non-Payment. If Customer defaults in the payment when due of any undisputed amounts under this Addendum 3. and does not cure the default within ten (10) days after receiving written notice of the default, then GeBBS may, by giving written notice to Customer, terminate this Addendum 3. and cease providing Services, as of a date specified in the notice of termination."

On December 9, 2015, Plaintiff provided Defendant with a Notice of Default and provided them 10 days to cure the default. On December 21, 2015, pursuant to Section 5(c) of Addendum 3, the Plaintiff provided written notice that it would terminate the Services (the "Notice of

Termination") effective at the close of business on Monday, December 21, 2015. Therefore, the termination was proper as the Plaintiff did terminate all Services, in compliance with the notice required by, and pursuant to, Section 5(c) of Addendum 3, as of Tuesday, December 22, 2015. Thus, the Plaintiff also fulfilled its obligation to provide at least ten (10) days written notice of the Termination of Services.

Furthermore, the fact that the Defendant seeks determination of damages at trial but is quick to assert that, in any event, such damages would exceed $500,000 without the support of facts or documents, speaks to the lack of the counterclaim's specificity.

For the above mentioned reasons, the Plaintiff requests that this counterclaim be dismissed.

ALLEGED FRAUD
(Count III of the Defendant's Amended Counterclaims)

The elements of fraud in New York include: a false representation of material fact, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury. Evans v. Ottimo, 469 F.3d 278, 283 (2d Cir. 2006) Under New York law, fraud must be established by clear and convincing evidence. *See* Rudman v. Cowles Commc'ns, Inc., 280 N.E.2d 867 (1972), *Id.* The Defendant alleges that the parties agreed that if the Plaintiff made a partial payment against the balance due, the Plaintiff would continue to perform the service for a reasonable time while the Defendant sought to find a replacement for the Plaintiff. ***There was no such representation made by the Plaintiff to the Defendant.***

As to a counterclaim, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Revonate Mfg., LLC v. Acer Am. Corp., No. 12 CIV. 6017 KBF, 2013 WL 342922, at *2 (S.D.N.Y. Jan. 18, 2013). Defendant's third counterclaim is a threadbare recital of the elements of fraud. By diligently duplicating the elements of the cause of action of Fraud, the Defendant fails to provide the court proof or documents as to the conduct of the Plaintiff that can support a fraud claim.

Furthermore, the Defendant in Paragraph 33 of its counterclaims states that the Plaintiff had no intention of continuing to perform the services for the Defendant. The Defendant assumes the lack of intent by the Plaintiff without any facts to warrant such assumption. The Defendant does not conclusively state what "misrepresentations" were made by Plaintiff so as to justify their detrimental reliance on the same. Plaintiff reiterates that they adhered to the addendum by providing the services and fulfilling their obligations under the addendum, and, continued to do so even after the Notice of Default (**Exhibit C**) was served upon the Defendant on December 9, 2015 until the date of termination of December 21, 2015.

Furthermore, in Paragraph 7 of the counterclaims, the Defendant asserts that RMI was not a predecessor in interest to Orion Inc. However, Clause A to Addendum 3 (**Exhibit B**) specifically states that RMI is a predecessor in interest to Orion, Inc. Hence, misrepresentations, if any, are being made by the Defendant and not the Plaintiff.

Therefore, for the reasons expounded above, the Plaintiff requests that this counterclaim be dismissed.

CONCLUSION

The counterclaims presented by the Defendant are frivolous, lacking in factual support, and intended to prolong litigation. Even if the court were to take the Defendant's recitation of facts as true, they are still insufficient to support their claims per the legal threshold under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Wherefore, based upon the foregoing, the undersigned Affirmation, together with all of the exhibits respectively annexed thereto, the Plaintiff request that this Court issues an Order (a) dismissing Defendant's Counterclaims dated October 11, 2016 for failure to state a claim upon which relief can be granted and (b) Granting the Plaintiff such other relief that the Court deems just, proper and equitable.

Date: 11/21/2016 Prema Roddam

Prema Roddam, Esq.
Attorney ID No. 531400
Attorney for Plaintiff, GeBBS Healthcare Solutions, Inc.
Chugh LLP
168, East 7th Street, Suite 3B
New York, New York 10009
Tel: 732.205.8600
Fax: 732.205.8601